

WOMEN AND THE CONSTITUTION:

**An Agenda for Fair Representation
and Equal Protection**

Written for the National Constitutional Conference
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BACKGROUND

This paper is the result of discussions among many women leaders and activists in Malawi. The women met several times over the last few weeks in preparation for this conference, and the resulting discussions led to a consensus among the group on fundamental constitutional issues affecting women. This paper outlines the group's suggestions for strengthening the Constitution's provisions concerning women and details the group's strong desire to maintain and implement the provisions regarding the Senate as a means of guaranteeing the representation of women in the political process.

INTRODUCTION

Malawi has entered a new era. An era which provides an opportunity to ensure equality for all Malawian citizens and to allow all Malawians to participate fully in their government. This new environment is, perhaps most importantly, an opportunity for women. Women who have contributed vastly to the development of this country, but who have gained few economic or political benefits from their labors. Moreover, this is an opportunity for our country and our government to take an active role in removing barriers which have restrained women for so many years.

The women of Malawi are care givers, bread winners, mothers, homemakers, nurses, teachers, business women, administrators, civil servants and leaders. The roles that women play are absolutely crucial to the health, economic, political and educational status of our country. The survival of our economy, our democracy and our culture largely depends on the success of our women. It is the contradiction between the great and positive contribution of women and their lower political, economic, educational and health attainment that is the challenge we face in reviewing the Constitution. We, as a nation, must now rise to meet this challenge.

Women comprise over 52% of the population, yet currently have less than 6% representation in Parliament. Only 10 women serve in the National Assembly and only one in the Cabinet. It is clear that cultural barriers and discrimination have kept women from being represented fairly in our new system of government. In the period before the election, members of all eight political parties represented at the National Consultative Council were well aware that certain groups, including women, might be excluded for various reasons and thus provided for their representation through the creation of a second chamber, the Senate.

The Senate is the only constitutional mechanism which guarantees representation for women. Far from being a luxury, our country can ill afford to eliminate the Senate. Given the lack of women currently involved in the political process, there is a crisis of representation. The Senate is the only constitutional remedy to this crisis. Some may say it is undemocratic to reserve seats for certain groups. We believe it is undemocratic not to have major portions of our population represented.

For this conference, we have formed an alliance with the delegates who are representing Malawi's chiefs. With the chiefs we strongly support a Senate that will reserve elected seats for both women and chiefs as a means of providing adequate representation.

At this critical juncture in Malawi's history, we must not shut out half our population. Our country can not afford to wait the many years it will take to gain fair representation in the Assembly to have women's voices heard. We must give women an opportunity for political empowerment, an opportunity to work within the political system. It will forever be the shame of our country if, at this historic moment, we turn our backs on many of our most valuable citizens. In the new Malawi, women must not be left behind.

THE SENATE

Malawi's provisional Constitution, currently in effect, provides for the creation of a second chamber called the Senate. The Senate was approved by all eight political parties represented at the National Consultative Council (NCC). During the drafting of the Constitution, it was clearly the intent and purpose of the NCC, and of all political parties to provide a mechanism to ensure that certain groups were fairly represented in government. Delegates to this conference and Parliament must not forget the authority and process by which the Senate provision was drafted and approved. The groups which comprise the Senate must be given a chance to prove their value to the political process.

After the election most women expected the parties to move beyond their rhetoric. Women took seriously the words of most party manifestos written in the pre-election period which guaranteed 25% representation of women. Yet women are vastly under-represented at all levels of the political process, and now some politicians are trying to eliminate the Senate, claiming it is a luxury. However, the women of Malawi strongly believe that the Senate is a luxury that this country can not afford to lose. The Senate is the only constitutional guarantee and the only practical solution to representation for over half of our population.

Some have asked how we reconcile the concept of setting aside seats for certain groups with the concept of democracy. We believe our situation is no different than many other countries (e.g., India and Nepal) where new democracies have reserved political seats for women to specifically respond to a lack of representation. Malawi's situation implies a crisis in representation, and in fact, it is undemocratic not to address this crisis.

Unfortunately, no steps have been taken to facilitate the establishment of the Senate in the provisional period. It would be especially egregious for this conference or Parliament not to endorse taking these steps now.

Composition of the Senate

While we, as women of Malawi, are committed to keeping the Senate, we also understand the constraints, especially financial and logistical, faced by our new system of government. In the interest of saving money, we are proposing a more cost-effective design of the Senate.

Under our proposal, the Senate would be reduced from 80 to 58 members. These members would include one woman elected from each of the twenty-four districts, one chief elected from each district and ten other members chosen from the sectors listed under the Senate provision in the Constitution. In order to foster political development among women it is necessary for these positions to be elected, not appointed. In addition, we are proposing that candidates for the Senate may only qualify to run in a district in which they reside full-time. This would assist in ensuring that a member of the Senate was a true representative of the rural people.

The following points are compelling reasons to maintain and implement the Senate provision of the Constitution.

- **Representation of the Rural Population** - The Senate is the only mechanism which guarantees representation for women and chiefs. 80% of Malawi's population is rural, 52% is women. Women and chiefs are our closest links to the rural areas. The Senate, which would be comprised of these groups, would provide a supplemental avenue for adequate representation of the majority of Malawi's population. If we want the rural people of Malawi to be truly represented in Parliament, we must keep the Senate.
- **Intent and Purpose of the National Consultative Council** - The issues of the Senate were debated thoroughly during the pre-election period. It was clearly the intent and purpose of the NCC, comprised of all political parties, to create a body which would guarantee the representation of certain groups including women and chiefs. The Senate provision was approved by all parties as a means to include groups in the political process which might otherwise be excluded.
- **Placing Women in Decision-Making Bodies** - Women comprise over 52% of Malawi's population, but their representation in Parliament is less than 6% and their representation in Cabinet is less than 3%. The Senate, therefore, is the best way to ensure the representation of over half the population.
- **Enhanced Checks and Balances for Government** - The Senate would provide additional checks and balances for Malawi's new democracy. Our country has already experienced rule under a one chamber Parliament. The voters now want to experience the extra assurances and protection that a two chamber system affords.

- o **Constitutional Guarantee for the Representation of Women** - The Senate is the only constitutional guarantee the women of this country have for representation in government. Because of the daunting barriers women face in becoming involved in the political process, this is a guarantee that must be maintained. Otherwise, women face the prospect of vast under-representation for many years to come.
- o **Overcoming Cultural Barriers** - Women have not been encouraged to participate in party politics except in support roles. This fact combined with the many cultural barriers to participating in politics has prevented women from becoming fully involved in the political process. With a gender-balanced Senate, cultural barriers to women's participation in the political process would be minimized, thereby encouraging women to participate equally with men in political decision-making. Women can then gain the political experience necessary to run for other elected seats.
- o **Effective Remedy for Discrimination** - The Senate is an important and effective remedy for the discrimination the women of this country have endured. Many laws in Malawi expressly discriminated against women in economic, financial and social matters. Most of these laws have been repealed or are being revised. However, the effect of years of discrimination can not be erased instantly. The Senate, as a means of political empowerment, would assist women in overcoming discrimination.

Alternatives to the Senate

We are calling on the women of this country and their supporters to fight to keep the Senate. We truly believe that the Senate will be women's best guarantee of representation for many years to come. It would be a great injustice to remove that guarantee. However, we also understand that the Senate may not be approved and are, therefore, reluctantly proposing an alternative to the Senate.

The elimination of the Senate is so harmful to the future development of women in this country that we believe the only effective substitution would be the guarantee of a minimum of 25% representation in the National Assembly. Furthermore, we believe that for women to be truly equal members of the Assembly, these positions must be elected. We do not believe that appointed positions for women, whatever the number, would be democratic or would be viewed by the people as legitimate.

Conclusion

We, as women of Malawi, accept the challenge of beginning a grassroots campaign to educate women on the political process and to encourage them to become actively involved in political parties. However, it will take years for our work to eliminate the effects of legal discrimination and to overcome cultural barriers. In the interim, our country will lose a valuable voice if we do not take steps to ensure that women are fairly represented. The Senate is our best constitutional guarantee of representation, and we implore the delegates of this conference and members of Parliament to vote to retain it.

BILL OF RIGHTS (Chapter IV)

Women are aware that the provisional Constitution has strict requirements detailing the procedure for amending Chapter IV. However, we feel that augmentation to strengthen important protections for women at this provisional stage, especially since our proposals do not detract from the rights already listed, should be allowed. If, however, these amendments can not be made to Chapter IV, then we request that they be added in another appropriate section of the Constitution.

The following are our proposals to reinforce and strengthen certain rights for women in the Chapter IV of the Constitution.

- o Strengthen Section 24 by adding 24 (1)(a)(v) which states: **Women shall have the freedom to choose their residence and domicile. Anyone born in Malawi or elsewhere to at least one Malawian parent shall be a Malawian citizen. Any person who marries a Malawian shall have the right to become a Malawian citizen by that marriage.**
- o Change Section 24 (a)(iv) to read "to acquire, **change** and retain citizenship and nationality."
- o Strengthen Section 24 by adding 24 (1)(a)(vi) which states: **Men and women have the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise their right.**
- o Broaden Section 24 (ii) on women's property rights to read "acquire, **own** and maintain rights in property..."
- o Strengthen Section 24 (2) to state: Any law **administrative procedure or practice** that discriminates against women on the basis of gender or marital status shall be declared **null and void, ab initio** and legislation shall be passed..."
- o Strengthen Section 24 (2)(a) by stating: sexual abuse, harassment and **all forms of violence**;
- o Add language to Section 24 (2)(d), which expressly **prohibits the traffic in women and the exploitation of women through prostitution.**
- o In Section 24 (1)(b)(i) eliminate the phrase "fair disposition of jointly held property" and replace it with "**fair disposition of matrimonial property.**"
- o In Section 31 (3), add "**job security, benefits and conditions of service**" to the list of protections for

women.

- o In either Section 24 (1)(a) or Section 29, add language which states: **Women will be accorded the same rights as men to obtain bank loans, mortgages and other forms of financial credit.**

THE CABINET

Women will continue to be vastly under-represented in Parliament until a significant campaign to educate women at the grassroots level can be undertaken. The Senate is one remedy to this untenable situation, but we also believe that it is vitally important for women to be fairly represented in the executive branch, where many important decisions affecting the lives of this country's women are made on a daily basis. Currently, only one woman serves in the Cabinet. We propose that, at minimum, 30% of the Cabinet be comprised of women to ensure that the actions of the Cabinet fairly reflect the voice of over half of the population.

HUMAN RIGHTS COMMISSION/ELECTORAL COMMISSION

The Human Rights Commission and the Electoral Commission are two bodies which will be paramount in eliminating discrimination and in determining future participation in the political process. Given that women have most often been the victims of human rights abuses and that women have largely been shut out of the political process, we believe that it is extremely important for women to have equal representation on the Human Rights and the Electoral Commissions. We, therefore, propose that women comprise 50% of both bodies.

OTHER PROPOSED CHANGES

There are three other proposed changes to the Constitution which would significantly enhance the rights of women in the Constitution. They are as follows:

- o The Preamble - Because of the overwhelming discrimination endured by women, extra care has to be given by the state to correct these injustices. An additional statement in the preamble calling for the elimination of discrimination against women would leave no doubts that the new government of Malawi is committed to equal rights for women.
- o Strengthen Chapter 1, Section 6, by including an additional statement which reads "it is the special duty of the state to encourage women to vote and participate in the political process."
- o Include a statement in Chapter 2 instructing courts to take into account affirmative action for women in interpreting the Constitution.